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USPOLAD,

TOKYO

A-453 Jan 7,1952

Subject: FCN Treaty with Japan. Mission's despatch 925, Dec 14.

This is the fourth in the series of replies to ref. despatch.

Article VII.

2. The first paragraph of this Article can be considered the heart of the treaty; it is the basic "establishment" provision, prescribing the fundamental principle governing the point of business and the making of investments, in a treaty which is above all a treaty of establishment. A satisfactory formulation of it, and its corollary provisions in the remainder of the article, is therefore of particular importance and to be approached with especial care.

The new standard formulation of Article VII (and its companion, VIII) as proposed to Japan has already appeared in the treaty with Israel, but was developed too recently for use in the negotiations leading to the other treaties hitherto signed. Its inclusion in a treaty with Japan would not, therefore, be unprecedented, as the despatch seems to suppose. The formulation proposed to Japan is considered to be more precise than that formerly in use (as appearing in the Colombia treaty, for example); and it is not believed that the substitution of the Colombia treaty wording would meet the avowed Japanese desire for greater precision. Rather, the contrary is probably the case.

While the formulation as found in the Colombia treaty is a respectable, worthy and much used one, it has been open to certain criticisms. The use of the recitative technique ("commercial, manufacturing ... etc.") for describing the types of activities covered by

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covered by the national treatment rule mechanically leaves play for interpretation as to exactly what businesses are and what are not covered, especially the borderline cases; and the residual rule applicable to types of activities not covered by national treatment is not as adequate as might be, among the latter being activities in which Americans have heavy investment interests abroad (mining, petroleum, public utilities and branches agriculture). This formulation has also led sometimes to translation difficulties, as well as to the need for devising various explanatory materials in the Protocol and inter-executive minutes. The Department has endeavored to remove or reduce such criticisms by the device employed, in the new standard formulation, of first stipulating the principle of one plus coverage for all business activities, of every type and in whatever juridical form (paragraph 1), and, second, of then drafting an exception precisely defining what is not so covered and of stipulating the rule applicable thereto (paragraph 2). Although the Department considers the new standard formulation definitely preferable in general, it will keep open mind about the possible substitution therefor of the Colombia formulation in the Japanese case, if after further discussion and study of Japanese views and circumstances it should transpire that this would be expedient.

2. As to restrictions applicable to alien purchase of Japanese securities, reference may be made to paragraph 4 of Article IV for the Department's standard provision in this connection. This reservation is of limited scope, in conformity with the purposes and scheme of the Department's treaty proposals. If it is not adequate for the Japanese, it will be necessary to have exact information as to wherein and why it is inadequate, as a prelude to exploring what if any adjustment may be satisfactory and proper. The Department approaches with caution any proposal to weaken the principles it advocates with respect to equality of opportunity in investment and business.

3. The FCN treaty is not designed to continue the occupation or any features thereof. Except that the conclusion of the treaty presupposes full Japanese sovereign status, the treaty in and of itself

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itself is in principle entirely neutral as to occupation matters. However, the bearing of paragraph 2 of Article VII on the continuance of private rights that may have become established under and during the occupation may be a different question, concerning which the Department would not care to venture an opinion in vacuo. It is therefore requested that the Japanese explain just what situations and problems they visualize in this connection.

4. As mentioned under point 1 above, the Department, while not yet ready to concur in substituting the Colombia treaty wording, does not foreclose the possibility of accepting the Japanese suggestion to this effect after further examination of the exact Japanese objections to the present standard wording. It would probably help in the analysis of the problem to have from the Japanese more concrete information as to what they mean by a "new draft clearly enumerating the various types of business activities contemplated".

Article VIII.

1. The Japanese suggestions evidently relate to the second sentence of para rank 1, and not to the first sentence. The two additional clauses mentioned, as interpreted in the Greek treaty, were not there regarded as changing in any significant way the intent of the provision. They rendered explicit what was already pretty much implicit in the original wording. In the Department's opinion they are rather unnecessary, as they merely add superfluous verbiage to an already wordy sentence; but the Department would undoubtedly be willing to accept them if the Japanese feel they would be necessary and appropriate.

2. Before discussing a possible enumeration of particular professions to be excepted from the rule of paragraph 2, the Department would wish to have a complete list of those which the Japanese would want to be so enumerated; and a serious consideration of whether, in light of the remarks under "3" below, the Japanese

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indeed rich to warrant any exercise. While it may be desirable, if necessary, to consider accepting a limited number of professions that enjoy an especially sensitive status, the agreement might be drafted rather to cover merely some such altogether than to have it continually undermined by an inordinate list of reserved professions.

3. There are indeed numerous state laws barring aliens from the practice of various professions. All states (including the District of Columbia) that attorneys-at-law be citizens. As to physicians, thirteen impose citizenship requirements and an additional twelve do not license aliens to practice law unless they have filed declaration of intention to become citizens, making a total of 25 having citizenship disabilities. As to engineers, seven impose citizenship requirements, and an additional seven exclude non-declarant aliens, for a total of 14. (The foregoing is derived from a compilation made in 1946. It must circumscribe is a reliable guide, more up-to-date information would be expected to show a greater, rather than a less, amount of restrictions against aliens). There are, of course, numerous other professions and occupations (ranging from accountants to wrestling promoter) which are reserved in the laws of one, several, or many states. The pattern is very variable and uneven.

The existence of such statutory disabilities, of course, underscores the advantage to the Japanese of including paragraph 2 in the treaty. The treaty, being the supreme law of the land and enforceable as such before the court, is paramount over all state legislation. To the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be thus fully overridden, insofar as Japanese nationals were concerned.

4. The question of where the provisions of paragraph 3 may most logically be entered is essentially a question of form; and the Department does not visualize any difficulty in reaching perfect agreement thereon with the Japanese.

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